88-679

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES E. BROWN, JR.,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

PAUL M. HARDEN
104 Court Square, Suite 3
Evergreen, Alabama 36401
(205) 578-4746

Attorney for Petitioner

Question Presented

Whether Petitioner, a Baptist minister and school teacher, was denied a fair and impartial trial and due process of law when he was convicted of the offense of sexual misconduct after the trial court denied his motion for a change of venue, even though the record clearly shows the trial was held in a county saturated with prejudicial pre-trial publicity against Petitioner.

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CHARLES E. BROWN, JR.

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STATE OF ALABAMA,

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PETITION FOR A WRIT OF CERTIORARI TO THE ALABAMA SUPREME COURT

Petitioner, Charles E. Brown, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the Alabama Supreme Court and the Court of Criminal Appeals for the State of Alabama, whereby substantial constitutional issues presented by Petitioner were not answered by either of the said Courts, even though timely raised.

Opinion Below

The rulings of the Court of Criminal Appeals as to

the original appeal filed on April 26, 1988, (Third Division, Number 723), set forth **Infra** in Appendix 1a.

The denial of Petitioner's application for rehearing as well as the motion for Rule 39(k), which was filed on May 10, 1988, as set forth **Infra** in Appendix 2a.

The denial of a petition for writ of certiorari to the Court of Criminal Appeals by the Alabama Supreme Court on August 19, 1988, as set forth **Infra** in Appendix 3a.

Jurisdiction

The petitioner invokes this Court's jurisdiction pursuant to 28 USC §1257 (3) in that it sets up a claim of the Petitioner's rights to a fair and impartial trial and the due process of law as guaranteed to him in the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States; hence, Petitioner's application to this Honorable Court to review the order of the Alabama Supreme Court dated August 19, 1988, and entered by the Clerk of the Alabama Court of Criminal Appeals on August 19, 1988.

Constitutional And Statutory Provisions

This case involves the Fifth, Sixth and Fourteenth Amendments to the Constitution of the United States.

The Fifth Amendment to the Constitution of the United States states, in part, as follows:

> "No person shall....be deprived of life, liberty or property, without due process of law."

The Sixth Amendment to the Constitution of the United States, in pertinent parts, states as follows:

> "In all criminal prosecutions the accused shall enjoy the right to a ... public trial, by an impartial jury of the state and district wherein the crime shall have been committed...."

The Fourteenth Amendment to the Constitution of the United States, in pertinent parts, states as follows:

> "No State shall...deprive any person of life liberty or property, without due process of law."

Statement of the Case

The Petitioner was convicted in the District Court of Conecuh County, Alabama, for the offense of sexual misconduct. He appealed to the Circuit Court of Conecuh County, Alabama, and was tried on March 31, 1987, after the trial court denied a motion to change venue. That motion to change venue is found **infra** at Appendix 4a.

Petitioner was convicted after a trial by jury and sentenced to serve twelve months in the Conecuh County Jail.

On June 4, 1987, Appellant filed a motion for judgment of acquittal and a motion for a new trial. These motions were subsequently denied by the trial court even though the constitutional errors were complained of.

On May 7, 1987, Petitioner gave an oral notice of appeal and the trial court suspended execution of sentence pending appeal.

On April 26, 1988, the Court of Criminal Appeals for the State of Alabama affirmed the trial court **without opinion.**

Then on May 10, 1988, Petitioner filed an application for rehearing and Rule 39 (k) motion with the Court of Criminal Appeals which were subsequently overruled and denied on June 14, 1988.

Petitioner subsequently filed a petition for writ of

certiorari in the Supreme Court of Alabama which was denied on August 19, 1988.

Hence, this petition for writ of certiorari.

In support of his motion for change of venue, Petitioner offered some twenty-six exhibits of evidence showing the prejudicial publicity his case had received in Conecuh County and surrounding counties. The evidence was uncontradicted that Petitioner's case received numerous newspaper reports as well as television broadcast and radio coverage.

Petitioner's case was also listed as one of the top news stories in Conecuh County in 1986.

Petitioner called witnesses who testified that Petitioner could not receive a fair and impartial trial in Conecuh County, Alabama, due to the prejudicial publicity that he had received in newspapers, on the radio, and on television stations.

Willie Garrett was called by Petitioner to give testimony about the adverse publicity Petitioner had received in Conecuh and surrounding counties. The trial court at **R. 13** began inquiring from the witness Garrett as to how he knew about the adverse publicity and the public opinion. His answer is found on page **R. 14** of the trial transcript:

> **"A Well, its had more publicity than the bombing Pearl Harbor." R.14.**

At the trial the State's evidence tends to show that Petitioner allegedly engaged in sexual misconduct with one John Sawyer during the twelve months from approximately December, 1984, to about December of 1985.

The State called John Sawyer who testified that he lived with Charles E. Brown, Jr., and Gail Brown and their minor daughter. Sawyer testified as the complaining witness that he first became acquainted with the Petitioner through his church where the Petitioner served as minister. He testified that on various occasions they traveled together by automobile to visit people at hospitals and in their homes. He said that when they rode together the Petitioner would make sexual advances toward Sawyer and put his hands on Sawyer's leg and fondle Sawyer's genitalia. He further testified that he went to live with the Petitioner because of a football injury and stayed with him for a period of about fifteen (15) months. During this time Brown supposedly engaged in homosexual intercourse with Sawyer on many occasions.

On cross-examination Sawyer testified that Charles Brown and his wife, Gail, disapproved of a young lady that Sawyer wanted to date because they thought that she had a reputation for being a "slut" and they had heard that she had gone to Michigan to get an abortion

on one occasion before she met him. Also, he testified that Brown and his wife took good care of him while he lived at their trailer. They provided him with shelter, food, clothes, spending money, and the use of one of the family automobiles any time he requested it. He stated that the family took him with them to church and that Petitioner's wife, Gail Brown, prayed for him during family prayer. Sawyer admitted that he did not report any of the allegedly sexual encounters with the Petitioner until sometime after he moved out of his trailer. In addition, he said that after he moved out of the Browns' home (where he claimed that the sexual encounters occurred) he went back on several occasions to share a meal with the Brown family. He testified that he was nineteen when he moved from Brown's trailer, and about seventeen or eighteen when he first had sex with him.

Sawyer said that while he lived with the Petitioner he was given sleeping pills almost every night by the Petitioner, Reverend Charles Brown. However, he said that he did not engage in sexual intercourse with him as often as that. He testified further on cross-examination that Gail Brown, Petitioner's wife, knew what was going on between Brown and himself. According to Sawyer's testimony, she and her daughter slept in a separate bedroom from the one used by him

and Brown, but she occasionally would interrupt them while they were in the act of intercourse or oral sex. Sawyer said that he knew about the lawsuit filed by Charles and Gail Brown against a man who was a good friend of his father. However, he denied that his filing the criminal charges against Brown several weeks after the lawsuit was instigated was motivated by a desire to help his father's friend or punish the Browns for filing the lawsuit.

The State rested, and on Page R-81 the trial court overruled and denied Petitioner's motions to exclude the State's evidence and for a directed verdict of acquittal made at the conclusion of the testimony of John Sawyer.

The Petitioner called Gail Brown who testified that she first met John Sawyer at the church where her husband was the Pastor. She stated that John Sawyer went to stay with them in October of 1984, after suffering a dislocated shoulder in a football injury. She also said that he was considered a part of the family and included in all their activities at school, church and elsewhere. She testified that her husband, Petitioner Charles Brown, slept only with her and their daughter in the master bedroom of their trailer--all night, every night--during John Sawyer's stay with them. Furthermore, she denied that her husband ever made sexual advances toward John Sawyer or engaged in homosexual ac-

tivities with him.

The Petitioner next took the witness stand on his own behalf and he testified that he had known John Sawyer for many years. He said that he was employed as a teacher at Conecuh County High School in addition to being an ordained Baptist minister. He went on to explain that John Sawyer had been injured at football practice one afternoon after school, and that the coach had carried him to his father's home. Later, Sawyer call Petitioner and asked him "to carry him to the doctor". **(R.98).** Brown agreed and took him to the hospital for treatment. The Petitioner was later asked by Sawyer's father to take care of John and "help him get ready to go to school". **(R. 98).** Again, Petitioner acquiesced and took Sawyer home with him to stay with his family.

The Petitioner denied ever making any sexual advances toward Sawyer, fondling Sawyer's genital organs, sleeping in the same bedroom with Sawyer, or engaging in any sort of homosexual intercourse with him.

The Petitioner then call several character witnesses from the community who all agreed that he was of good character, trustworthy, and could be counted on to tell the truth when a witness testifying under oath in a court of law.

REASONS FOR GRANTING THE WRIT

"Due process requires that the accused receive a trial by an impartial jury free from outside influences", Sheppard V. Maxwell, 384 U.S. 333, 362, 86 S. Ct. 1507, 16 L. Ed. 2d 600, 620 (1966); facts from the record show that this case received more publicity than the "bombing of Pearl Harbor"; the failure to accord an accused a fair hearing violates even the minimal standards of due process", Irvin v. Dowd, 366 U.S. 717, 722, 81 S. Ct. 1639, 6 L. Ed. 2d 751, 755 (1961); in essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, "indifferent" jurors, Groppi v. Wisconsin, 400 U.S. 505, 509, 91 S. Ct. 490, 27 L. Ed. 2d 571, 575 (1971).

This petition for writ of certiorari brings before this Honorable Court the question of whether or not the trial court and the appellate courts of the State of Alabama have deprived this Petitioner of his rights under the Fif-

th, Sixth and Fourteenth Amendments to the United States Constitution. Petitioner complains that those rights mentioned above were deprived of him when the trial court denied his motion for change of venue. That motion is set out **infra** at Appendix 4a.

Petitioner argues that the trial court did, in fact, commit error by abusing his discretion in denying the motion for change of venue. As the record in this case will disclose, some twenty-six exhibits of evidence were introduced showing the prejudicial publicity this case received in Conecuh County, Alabama, and surrounding counties. We draw this Court's attention to Defendant's Exhibit 26 which is found in the Circuit Clerk's record at page 69. That Exhibit shows that Petitioner's case was one of the top ten news stories in Conecuh County in 1986.

The fact that Petitioner was a Baptist Minister and had been for several years, as well as a school teacher at Conecuh County High School in Castleberry, caused the news media to center on his case with extreme velocity. One witness even characterized Petitioner's case as drawing more attention than the "bombing of Pearl Harbor".

This Court has held that a conviction could not constitutionally stand where the jury has been infected by

community prejudice before the trial commenced, **Irvin v. Dowd,** 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751, (1961). Going further in **Irvin, supra,** this Court held:

> "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing even the minimal standards of due process...A fair trial in a fair tribunal is a basic requirement of due process". **Irvin,** at 722.

This Court has recognized that there are cases where only a change of venue is constitutionally sufficient to assure the kind of impartial trial as guaranteed by the Fourteenth Amendment. In the case of **Rideau v. Louisiana,** 373, U.S. 723, 726, 83 S. Ct. 1417, 10 L. Ed. 2d 663, 665 (1963), this Court held it was "denial of due process of law to refuse the request for a change of venue, after the people of Calcasieu Parish had been exposed repeatedly and in depth" to the prejudicial pretrial publicity there involved. Even though we recognize that **Rideau** was a case involving a confession to a murder, we are convinced that the holdings in that case should be applied to Petitioner's facts.

Even though Petitioner is not charged with murder and did not confess on television as did Rideau, the evidence from the record that Petitioner's case received

more publicity in Conecuh County, Alabama, than the "bombing of Pearl Harbor", clearly shows the impossibility of obtaining an untainted jury venire for the trial of his case.

In **Sheppard v. Maxwell,** 384 U.S. 333, 620 86 S. Ct. 1507 (1966), 362 16 L. Ed. 2d 600, this Court held as follows:

> "From the cases coming here we note that unfair and prejudicial news comment on pending trials has become increasingly prevalent. Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jury, the trial courts must take strong measures to insure that the balance is never weighed against the accused, and Appellate tribunals have the duty to make an independant evaluation of the circumstances. Of course, there is nothing that proscribes the press from reporting events that transpire in the courtroom, but where there is a reasonable likelihood that prejudicial news prior to trial will prevent a fair trial, the judge should continue the case until the threat abates or transfer it to another county not so permeated with publicity".

This Court went further in **Sheppard, supra**, to

suggest that where there is adverse pre-trial publicity the trial court should sequester the jury. In the case subjudice Petitioner requested such sequestration, and again the trial court denied him relief.

Petitioner cannot even imagine a trial in which an individual's constitutional rights to a fair and impartial trial by jury, and his rights to due process of law, could be more disregarded by a trial court.

Petitioner further complains that the appellate tribunals of the State of Alabama have ignored and disregarded their duty to make an independant evaluation of the circumstances. Both appellate tribunals for the State of Alabama affirmed the trial court's action without opinion, even though the constitutional issues were preserved and presented to the tribunals.

Accordingly, certiorari should be granted to review the substantial constitutional issues contained in Petitioner's case, and which have not been addressed by any other appellate tribunal.

CONCLUSION

The petition for writ of certiorari should be granted and the courts of the State of Alabama ordered to grant him a new trial.

Petitioner is respectfully requesting that this Court order the State of Alabama to secure to him his rights to a fair and impartial trial and due process of law as guaranteed by the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Dated: Evergreen, Alabama
October 17, 1988

Respectfully submitted,

Paul M. Harden
Attorney for Petitioner
104 Court Square, Suite 3
Evergreen, Alabama 36401
(205) 578-4746

APPENDIX

THE ALABAMA COURT OF CRIMINAL APPEALS

Montgomery, Alabama

RE: **CC-86-097**

3rd Division, 723 Conecuh County Circuit Court

CHARLES E. BROWN, JR.,

Appellant,

v.

THE STATE,

Appellee.

Dear Sir: You are hereby notified that on April 26, 1988, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Affirmed on appeal. No Opinion.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

THE ALABAMA COURT OF CRIMINAL APPEALS
Montgomery, Alabama

RE: **CC-86-097**

3rd Division, 723 Conecuh County Circuit Court

CHARLES E. BROWN, JR.,
Appellant,
v.
THE STATE,
Appellee.

Dear Sir: You are hereby notified that on June 14, 1988, the following indicated action was taken in the above-styled cause by the Court of Criminal Appeals of Alabama:

Application for rehearing overruled. Rule 39(k), A.R.A.P. motion denied. No opinion.

MOLLIE JORDAN
CLERK
COURT OF CRIMINAL
APPEALS OF ALABAMA

THE STATE OF ALABAMA — JUDICIAL DEPARTMENT

IN THE SUPREME COURT OF ALABAMA

August 19, 1988

Ex parte Charles E. Brown, Jr.

87-1153

PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF CRIMINAL APPEALS

(In re: Charles E. Brown, Jr.

v.

State of Alabama)

CERTIFICATE OF JUDGMENT
WRIT DENIED

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari be denied.

Maddox, J. - Torbert, CJ., Almon, Beatty & Houston, JJ., CONCUR.

STATE OF ALABAMA

Plaintiff,

vs.

CHARLES E. BROWN, JR.,

Defendant.

IN THE CIRCUIT COURT OF
CONECUH COUNTY, ALABAMA
CRIMINAL ACTION NO. **CC-86-097**

MOTION FOR CHANGE OF VENUE

Comes now the Defendant in the above-styled cause and moves to transfer the proceeding in the above styled cause to another county beyond a radius of 100 miles from Evergreen, Alabama, and to a county with a constitutionally composed Traverse Jury List. In support of this motion, Defendant states as follows:

1. Several newspapers in the area of Conecuh County, Alabama, and surrounding counties have published and circulated newspaper articles describing the acts with which the Defendant is charged, and these papers include significant portions of documentary and hearsay evidence relating to the Defendant, the admissibility of which has not been considered by this

Honorable Court, and this information has severely prejudiced the Defendant.

2. To try the Defendant in Conecuh County where the community feeling is strongly set against him will violate his right to a fair trial by an impartial jury guaranteed by the Sixth and the Fourteenth Amendments of the United State Constitution.

3. Conecuh County is a small county. It is particularly difficult to get a fair trial in cases such as this in small counties because the jurors generally know each other and do not want to buck the community sentiment and favor conviction even though the evidence may be weak.

4. That the Defendant, Charles Edward Brown, Jr., is charged with the offense of sexual misconduct while holding the position of teacher in the Public Schools of Conecuh County, and Pastor in Conecuh County, Alabama, all of which have led to widespread discussions and talk prejudicial to the Defendant.

5. For all of the foregoing reasons and others which will be developed in the hearing on this motion, an impartial jury cannot be obtained in Conecuh County. The prospective jurors have developed fixed opinions and such degree of prejudice as to render a fair trial impossible in Conecuh County and adjoining coun-

ties. All of this would render trial in these counties illegal and unconstitutional under Article One, Sections Six and Thirteen of the Alabama Constitution, and the Sixth and Fourteenth Amendments of the United States Constitution.

WHEREFORE, Defendant moves for an evidentiary hearing on this motion, and that this motion for change of venue be granted.

Respectfully submitted,

Paul M. Harden
Attorney for Defendant
104 Court Square, Suite 3
Evergreen, Alabama
(205) 578-4746